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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 210

BERNARD E. BIEHLENBACH also called BARNEY BIEHLENBACH and doing business under the fictitious name of SKI-FREE COMPANY,

Petitioner,

vs.

ANDERSON AND THOMPSON SKI CO., INC., a corporation,

Respondent.

Reply Brief in Support of Petition for a Writ of Certiorari

To the United States Court of Appeals for the Ninth Circuit

EDWARD B. GREGG
410 Mills Building
San Francisco, California
Counsel for Petitioner

MELVIN R. STIDHAM
Of Counsel

BORG PRINTING COMPANY OF CALIFORNIA, 100 FIRST STREET, SAN FRANCISCO 5

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In View of the Granting of a Writ of Certiorari in Brulotte v. Thys Co., No. 707, October Term, 1963, It Is All the More Appropriate to Consider the Misuse Issue Raised by This Petition.

Since the filing of the Petition herein, it has come to the attention of Petitioner's counsel that this Court has granted certiorari[1] in *Walter L. Brulotte et al v. Thys Company,*

1. 84 S.Ct. 666.

No. 707, October Term, 1963, which will be heard this fall.

The Brulotte case concerns the same general subject matter—the area of conflict between (1) the patent laws (and the rights which flow therefrom, including the right to enjoin and recover damages for infringement, and to grant licenses and collect royalties therefor), and (2) the law of contract, including the right to contract freely under State laws and to exercise restraints subject to the common law and the statutory law of the States and subject to the Federal anti-trust statutes and the Federal case law regarding patent misuse.

In *Brulotte*, the question which this Court has agreed to review is whether a patent owner may by contract require payment of royalties beyond the term of his patent.

In the present case, one of the questions which this Court is asked to review is whether a contract which restrains a dealer or distributor in a manner which may or may not (depending upon the facts) be contrary to the policy of the anti-trust laws, is nevertheless a patent misuse regardless of the facts.

It is believed that this question presented here is of even greater importance than the question in *Brulotte* because exclusive dealership contracts are an important and widespread mode of doing business and, as pointed out in *Standard Oil* and *White Motor*, they may represent the difference between failure and success for small, independent businessmen.

By granting a writ and deciding this question, as well as the question in *Brulotte*, this Court would, during its 1964 Term, clarify and settle a large and important area in the field of patent law and the law of contract.

The Standard Oil, Tampa, White Motor and Morton Salt Cases.

Respondent's Brief states (pages 1 and 2) that the decision of the Court of Appeals in this case does not conflict with the Standard Oil (*Standard Oil Co. of California*, 337 US 293, 69 S.Ct. 1051, 93 L.Ed. 1371, 1949), Tampa (*Tampa Electric Co. v. Nashville Coal Co.*, 365 US 320, 81 S.Ct. 623, 5 L.Ed. 2nd 580, 1961) and White Motor (*White Motor Co. v. U. S.*, 372 US 253, 83 S.Ct. 696, 9 L.Ed. 2nd 738, 1963) cases and that, because none of these three cases "involved questions of patent misuse", the Court of Appeals correctly decided that they do not "overrule the patent misuse concepts proclaimed by this Court in *Morton Salt Co. v. Suppiger Co.*, 314 US 488, 62 S.Ct. 402, 86 L.Ed. 363, (1942)."

This approach illustrates the confusion that exists among the lower courts and in the legal profession as to the relationship between the anti-trust law and the doctrine of patent misuse; and it clearly indicates why this Court should resolve that question by granting the petition.

The anti-trust laws apply to certain restraints. The courts have held some of these restraints to be so odious as to be unlawful *per se*, examples being a tie-in of patented with unpatented goods (involved in *Morton Salt*), group boycotts, price fixing, etc. (See *White Motor* at 372 US 259, 260, 83 S.Ct. 700, 9 L.Ed. 2nd 744). Other restraints are recognized as having a potential for good or for bad and, therefore, they cannot be condemned as wrongful conduct *per se* (*White Motor*, supra). Among such potentially good, potentially bad restraints is the precise restraint which is involved here, namely, a restraint placed by a manufacturer upon a dealer or distributor with respect to dealing in the goods of a competitor.

Morton Salt did not hold that any and all restraints are a patent misuse; it held only that a particular type of restraint (a tie-in of patented with unpatented goods), which is recognized as a *per se* anti-trust violation is also a *per se* patent misuse, even in the absence of proof of damage which would be required to support a suit for treble damages under 15 USC 15. *Morton Salt* held that, where there is conduct which is a *per se* anti-trust violation, such conduct should be punished by refusing to enforce patents which have made the conduct possible.

Clearly, and apart from semantics, the Court of Appeals in the present case has extended the *Morton Salt* rule, and the direction of its extension is opposed in principle to *Standard Oil, Tampa* and *White Motor*. If the Supreme Court agrees with this extension, so be it; but let there be an end to confusion and uncertainty on this point by granting the petition and deciding the matter once and for all.

The Conflict Between This Case and the Preformed Line Products Case.

Respondent asserts that, in *Preformed* (*Preformed Line Products Co. v. Fanner Mfg. Co.*, 328 F.2d 265), the Court of Appeals for the Sixth Circuit "was only concerned as to whether or not the exclusive dealing arrangement violated the anti-trust laws" (page 2 of Respondent's Brief).

For the convenience of this Court, the complete text of the opinion of the Court of Appeals for the Sixth Circuit in the *Preformed* case, insofar as it relates to patent misuse (and apart from the section entitled "Purge of Misuse", which is not pertinent here), is set forth in the Appendix hereto. Note that this carefully constructed opinion bears the following sub-headings: "Validity of Patent No. 3" (328 F.2d page 267); "Validity of Patent No. 4" (page 270);

"Infringement of Patent No. 3" (page 273); "Infringement of Patent No. 4" (page 273); "Scope of License Agreement" (page 274); "Misuse of Patent No. 4" (page 274); and "Purge of Misuse" (page 278).

Under the heading "Misuse of Patent No. 4" appearing at 328 F.2d pages 274 to 278 (pages 1 to 7 of the Appendix hereto), the court dealt not only with the question of tie-in of patented with unpatented goods but also with the question of *exclusive dealing arrangement*. Commencing with the third full paragraph on page 277 (page 6 of Appendix), the court said: "Next we reach the question of exclusive dealing arrangement." This is under the sub-heading, "Misuse of Patent No. 4". Thereafter (and under the same sub-heading) the court points out that "The Supreme Court has set guidelines to demonstrate when an exclusive dealing arrangement violates the anti-trust laws" and then quotes *in extenso* from this Court's opinion in *Tampa*.

The Court of Appeals for the Sixth Circuit, applying the *Tampa* guidelines to Preformed's exclusive dealing arrangement, determined that it did violate the anti-trust laws because its "power over the market" gave it the power to effectively foreclose competition in a substantial share of the line of commerce affected (328 F.2d 277, Appendix page 7). The court concluded (second paragraph on page 278, page 7 of Appendix):

> "On the basis of the finding of plaintiff's misuse of patent No. 4, it was properly denied relief for infringement by the defendant until it could show that it had wholly abandoned its improper practices and that their consequences had been fully dissipated."

It is incorrect to say that the Court of Appeals for the Sixth Circuit in the *Preformed* case did not consider an

exclusive dealership arrangement as being a species of patent misuse.

A conflict certainly exists between the Ninth and Sixth Circuits as to the question whether an exclusive dealership contract is a *per se* defense to a patent infringement suit, or whether it is subject to the guidelines set forth in *Tampa*. The Court of Appeals for the Ninth Circuit held in the present case that such a contract is a *per se* defense and does not require application of the guidelines of *Tampa*. The Court of Appeals for the Sixth Circuit held in *Preformed* that such a contract is not a *per se* defense and is subject to the guidelines of *Tampa*. "A rose by any other name is still a rose"; whether we call it "misuse" or "antitrust violation", the fact is that the same *fact* (exclusive dealership) is treated by the Ninth Circuit as a *per se* defense and by the Sixth Circuit as a *non-per se* defense which is subject to the guidelines of *Tampa*.

Both a Constitutional Question and a Question of the Propriety of Summary Judgement Are Involved as Regards Interpretation of the Sales Agreement.

Respondent does not deny that Petitioner has been deprived of the valuable right to grant licenses under his patent. Respondent is satisfied to contend that Petitioner has deprived himself voluntarily of that right by reason of the Sales Agreement with Northland; and that, as to this, Petitioner has had his day in Court.

On the point of ambiguity of the Sales Agreement, respondent merely suggests that, out of respect for the trial court, the Circuit Court should not have reviewed the findings of the trial court.

Petitioner contends that he has been denied a trial. The findings of fact, conclusions of law and judgment of the

district court clearly support this (Transcript of Record, Vol. One, page 53 which refers to "defendant's Motion for Summary Judgment"). The Court of Appeals at 329 F.2d 783 (page 3 of the Appendix accompanying the Petition) states that "appellee filed a motion for summary judgment . . ." and at the same page (page 4 of the Appendix to the Petition), the Court of Appeals noted Petitioner's contention that, because of ambiguity, "summary judgment was improperly granted".

At the very least, Petitioner has consistently *contended* that he has been denied his constitutional right to a trial. At the very least, the Court of Appeals *should have examined* that issue and determined whether Petitioner was right or wrong. The Court of Appeals has refused to do this. This is a denial of due process.

Regarding the issue of estoppel, there was, indeed, evidence offered by way of depositions; and such evidence was, without contradiction, that Northland knew of the license negotiations between Petitioner and Respondent but did nothing. (Transcript of Record, Vol. One, pages 49A-49I.) Respondent's Brief at page 4 erroneously states that,

> "Although given ample opportunity, respondent [sic] failed to offer any evidence supporting its present contention that there is an estopped [sic] against Northland to contest the validity of the license to respondent".

It is presumed that "petitioner" was intended rather than "respondent". Even so, the statement is in the teeth of the facts set forth at page 6 of the Petition, where it is stated that "Northland had notice of the settlement negotiations" . . . but took no steps to prevent consummation . . . nor . . . warn Respondent of any adverse rights". The Petition

referred to the record (Vol. One, pages 49A to 491) and stated "No serious effort was made by Respondent to counter these contentions".

For the convenience of this Court a portion of the Berlenbach deposition is set forth at pages 8 and 9 of the Appendix hereto. The position of Northland is summarized by Berlenbach as follows:

> "Q. Were they [Northland] in favor of an agreement between yourself and Anderson and Thompson?
>
> A. To my knowledge they [Northland] were neither opposed or in favor of it when we wrote them."

If Respondent wishes to file a supplemental brief to support its statement that "respondent [meaning "petitioner"] failed to offer any evidence supporting its present contention", Petitioner will gladly consent.

Regardless of the outcome of the misuse issue, there has been a miscarriage of justice as regards the nature of the Sales Agreement between Petitioner and Northland (whether or not it is an exclusive license). By judicial fiat, and without considering proffered evidence which is entirely to the contrary, and without a trial, the District Court has handed over Petitioner's patent to Northland and the Court of Appeals has said, in effect, "We are not concerned."

The Prejudicial Effect of the Court of Appeals' Decision with Respect to Small Companies.

In his petition, Petitioner has pointed out (pages 7 and 11) that the decision of the Court of Appeals will bear most heavily upon small companies which are unable, and most lightly upon large companies which are able to set up captive sales organizations and to control the actions of their employees. Respondent does not deny this but simply states

that this assertion is "Without factual basis" (page 4 of Respondent's Brief).

There is no better basis for this assertion than the opinions of this Court. Thus, in *Standard Oil* at 337 US 293 at 320, 321, 69 S.Ct. 1051 at 1067, 93 L.Ed. 1371 at 1389, 1390, in his dissenting opinion (now the majority view of this Court), Mr. Justice Douglas said with regard to the probable effect of voiding exclusive dealerships:

> "Today there is vigorous competition between the oil companies for the market. That competition has left some room for the survival of the independents. But when this inducement for their survival is taken away, we can expect that the oil companies will move in to supplant them with their own stations. There will still be competition between the oil companies. But there will be a tragic loss to the nation. The small, independent businessman will be supplanted by clerks."

And in *White Motor*, at 372 US 253 at 263, 83 S.Ct. 696 at 702, 9 L.Ed. 2nd 746 (erroneously cited at page 10 of the Petition as 372 US 702, which should be 372 US 263), this Court said that vertical restraints of the type involved here between a manufacturer and his dealer or distributor:

> "... may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business."

Comments on Some Cases Cited by Respondent.

Respondent's Brief at page 2 cites *United States v. United Lens Co.*, 316 US 241, 251, 62 S.Ct. 1088, 1094, 86 L.Ed. 1408 and *United States Gypsum Co. v. National Gypsum Co.*, 352 US 457, 77 S.Ct. 490, 1 L.Ed. 2d 465 as authority for the proposition set forth in quotes at page 2 of its Brief, that the "particular form or method by which the [patent] monopoly is sought to be extended is immaterial."

In *U. S. v. Univis* (an anti-trust case), price fixing (which is not involved here) was at issue. In *U. S. Gypsum v. National Gypsum*, price fixing was also involved, but nowhere in either the majority opinion nor in the dissenting opinion can Petitioner's counsel find the quoted language attributed to that case.

Waterman v. MacKenzie, 138 US 252, 11 S.Ct. 334, 34 L.Ed. 932 is cited at page 3 of Respondent's Brief with regard to the nature of an agreement respecting a patent. This case holds that anything short of the grant of "the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States", or an undivided part of that right, or the exclusive right under the patent within a specified part of the United States

> "... is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement" (138 US 255, 11 S.Ct. 335, 34 L.Ed. 925).

The Sales Agreement between Petitioner and Northland did not convey to Northland "the exclusive right to make, use and vend the invention throughout the United States", nor an undivided part of that right, nor the exclusive right under the patent within a specified part of the United States. It conveyed only the exclusive right to sell (not to manufacture or to use) the safety bindings manufactured by Petitioner. The Sales Agreement was, at most, a mere license, not an exclusive license.

Conclusion

Respondent's Brief accentuates the fact that there has been a miscarriage of justice, that there is a conflict among the circuits on an important point of law, and that the Petition should be granted.

Dated, San Francisco, California
August 6, 1964

Respectfully submitted,

EDWARD B. GREGG
Counsel for Petitioner

MELVIN R. STIDHAM
Of Counsel

Appendix Follows

Appendix

Excerpt from Opinion of Court of Appeals of Sixth Circuit in Preformed Line Products Co. v. Fanner Mfg. Co., 328 F2d 274-278.

MISUSE OF PATENT NO. 4

Another defense to plaintiff's charge of infringement is that the plaintiff misused the patents in suit by a general abuse of the patent monopoly and by violating Section 3 of the Clayton Act. The District Court agreed as to Patent No. 4.

The trial court found facts as follows: The plaintiff's general policy was to refuse to sell to distributors or dealers unless they agreed to sell plaintiff's products exclusively.[10]

Regarding a series of business transactions between the plaintiff and the General Electric Supply Co. of Portland, Oregon, the court found that for several years prior to 1956 the General Electric Supply Co. of Portland had distributed plaintiff's products. In 1956 the distributor switched to defendant's products. Plaintiff's sales representatives sought to convince General Electric Supply Company's customers to buy elsewhere, from Preformed products distributors. Treasurer and Sales Manager Schloss succeeded in convincing the General Electric Supply Co. to resume

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10. P. H. Schloss, Treasurer and Sales Manager of plaintiff, testified on cross-examination as follows:

Q. All right. What has been the practice of Preformed Line Products Company where a distributor or a jobber may desire to handle Fanner products as a secondary line or a correlated line with Preformed Line Products' devices? What has been your policy—you are sales manager—in that regard?

A. "I would say that we don't want them selling both products.

Q. "That is, you do not want a distributor to sell Fanner Products at all; he is either going to sell all Preformed Line products or he isn't going to sell any; hasn't that been your policy?

A. "I would say in general, yes."

business relations and to deal exclusively with plaintiff.[11] The trial court found that while ostensibly General Electric Supply Co. had the option of dealing exclusively with Fanner or with Performed, by reason of the severe loss of business due to Preformed's efforts, the dealer really had no alternative but to deal exclusively with the plaintiff.

The court enumerated another instance of exclusive dealing in relation to the distributors of Indiana Steel & Wire Co. (This company is also a licensee of the plaintiff under patents Nos. 1 and 2.) The court found that the Graybar Electric Company was a distributor of the Indiana Steel & Wire Company. Specific instances of the plaintiff's application of its exclusive dealing policy as applied to Graybar "houses" were referred to in a "Blind note".[12] The court

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11. In a letter of December 10, 1957, to Sales Manager Schloss from John C. Shaffer, a sales representative of plaintiff, Shaffer wrote of "my discussions with General Electric Supply Company of Portland, forcing their decision whether to go Fanner or Preformed."

On the following day, Shaffer wrote to Schloss: "Phil, with regard to General Electric Supply Company, Portland and Medford. I can give you every assurance that they are now totally 100% Preformed Line Products Company and have discontinued the promotion and sale of Fanner."

12. A letter and memorandum dated April 10, 1958, from the home office to Shaffer and Nelson, plaintiff's sales representative at Spokane, Washington, spoke of the Indiana Steel & Wire Co. distributor, Graybar. The memorandum, styled "Blind note to P.L.P. personnel" read:

> "The Shaffer & Nelson organization, plus ourselves, have been trying to swing Graybar to the purchase of our materials only. Up to this date, they have wanted to purchase only products not manufactured by Indiana Steel & Wire Company from Preformed and to continue to purchase of their armor rods from the Indiana Steel & Wire Company.
>
> "Based on this thinking by Graybar, we have refused to ship them any of our products. This approach has worked successfully with a number of other Graybar houses in the country, where we have been able to convince them to purchase all of their products from our company * * *."

found that it was the plaintiff's purpose to enforce the exclusive dealing policy against the Graybar Company of Spokane, Washington.

The court found that following the issuance of patent No. 3 (the short pitch armor rod patent herein declared invalid), the plaintiff accepted royalties from Fanner and Indiana Steel and Wire Company on all armor rods manufactured and sold by its licensees. The plaintiff competed with the licensees in the sale of armor rods. The court found in the record no attempt by the plaintiff to restrain competition until after the issuance of the dead end patent No. 4 in September 1956.

The trial court accordingly drew the following factual conclusions: (1) After October 1956, the plaintiff embarked upon the policy of restraining competition in unpatented or licensed armour rods by tying the purchase of such devices to the purchase of the patented dead ends; (2) The plaintiff's real purpose was to foreclose competition by its licensees who were its only competitors; and (3) The sale of dead ends to Graybar was conditioned on the purchase by that company from plaintiff of other products not within the protection of patent No. 4.

Finally, the court found the economic significance of the plaintiff and the dead end: The plaintiff is the largest manufacturer and seller in the United States of helically preformed reinforcements and attachments of use on electric cables. It is the dominant company in this specialized field, its only competitors (Fanner and Indiana Steel & Wire Co.) being its two licensees. The patent No. 4 dead ends are now widely accepted in the electrical industry, and, therefore, good business practice requires jobbers and distributors of armor rods to carry preformed dead ends in stock.

The essential vice complained of here is that the sale of dead ends, protected under patent No. 4, was conditioned on the purchase by the buyer of other helical products not within the protection of this patent. This is the principal question on the issue of misuse. This asserted attempt to condition purchase of unpatented or licensed goods upon the purchase of patented goods can be both a patent misuse (abusive extension of the statutory patent monopoly) and a violation of Section 3 of the Clayton Act (by a tying arrangement). In the proof of illegal tying arrangement under the anti-trust laws, the evidence must demonstrate that a party had sufficient economic power to restrain free competition. We treat the questions together.

The basic public policy of the patent misuse doctrine was enunciated by the Supreme Court in Mercoid Corp. v. Mid-Continent Co., 320 U.S. 661. The Court said, at p. 665, 60 USPQ 21, 24: "The grant of a patent is the grant of a special privilege 'to promote the Progress of Science and Useful Arts.' Const., Art. I, Sec. 8. It carries, of course, a right to be free from competition in the practice of the invention. But the limits of the patent are narrowly and strictly confined to the precise terms of the grant. * * * It is the public interest which is dominant in the patent system."

The Court reaffirmed the doctrine that under the public policy of the patent laws a patentee could not be permitted to enlarge the practical scope of his lawful monopoly by tying other goods and thus restrain competition in goods not covered by the patent. Mecroid v. Mid-Continent Co., 320 U.S. 661, 664, 60 USPQ 21, 24; See Motion Picture Co. v. Universal Film Co., 243 U.S. 502; Carbice Corp. v. American Patents Development Corp., 283 U.S. 27, 8 USPQ 211; Leitch Mfg. Co. v. Barber Co., 302 U.S. 458, 36 USPQ 35; Morton Salt Co. v. Suppinger Co., 314 U.S. 488, 52 USPQ 30.

The Supreme Court has defined a tying agreement as: "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Northern Pac. R. Co. v. United States, 356 U.S. 1, 5-6. See Aluminum Co. of America v. Sperry Products, Inc., 285 F.2d 911, 926, 127 USPQ 394, 406, C.A. 6, cert. den., 368 U.S. 890, 131 USPQ 498.

In an anti-trust context the Court said: "Where the sale of an unpatented product is tied to a patented article, that is a per se violation since it is a bald effort to enlarge the monopoly of the patent beyond its terms." White Motor Co. v. United States, 372 U.S. 253, 259. (Citing Mercoid Corp. v. Honeywell Co., 320 U.S. 680, 684, 60 USPQ 30, 32, and International Salt Co., Inc. v. United States, 332 U.S. 392, 395-396, 75 USPQ 184, 186.)

The Court, in Northern Pac. R. Co. v. United States, 356 U.S. 1, stated, at p. 6, (referring to tying arrangements): "They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected * * *." See White Motor Co. v. United States, 372 U.S. 253, 262.

Applying the law to the facts, the trial court determined that the plaintiff, by its general policy of tying the purchase of armor rods to the purchase of patented dead ends, was attempting to create a limited monopoly in unpatented devices in contravention of the public policy of the Constitution and laws of the United States covering patents. The court concluded this general policy was also violative of the anti-trust laws, i.e., the Clayton Act.

We find that the facts and factual inferences drawn by the trial court are supported by the evidence and are not clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure. Further, we are in accord with the legal conclusions drawn from those facts and agree that the plaintiff misused its patent monopoly and violated Section 3 of the Clayton Act by the tying arrangement.

Next we reach the question of exclusive dealing arrangement. The Supreme Court has set guidelines to demonstrate when an exclusive dealing arrangement violates the antitrust laws: "In practical application, even though a contract is found to be an exclusive-dealing arrangement, it does not violate the section unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected. Following the guidelines of earlier decisions, certain considerations must be taken. First, the line of commerce, i.e., the type of goods, wares, or merchandise, etc., involved must be determined, where it is in controversy, on the basis of the facts peculiar to the case. Second, the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies. In short, the threatened foreclosure of competition must be in relation to the market affected * * *.

"Third, and last, the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market. That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited * * *.

"To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume

of commerce involved in relation to the total volume of commerce–in the relevant market area, and the probable immediate and future effects which preemption of that share of the market might have on effective competition therein." Tampa Electric Co. v. Nashville Co., 465 U.S. 320, 237, 328, 329.

The trial judge discussed the issue of whether the plaintiff had, in violation of Section 3 of the Clayton Act, set up an exclusive dealing arrangement. The court stated: "Plaintiff had the right to refuse to sell any of its products to General Electric Supply Company. It also had the right to take legitimate and effective steps to prevent distributors from purchasing dead ends from defendant, who was infringing Patent No. 4 by the sale of such devices. However, plaintiff transgressed the bounds of legality by requiring General Electric Supply Company to buy all of its products from plaintiff as a condition of purchasing any products from plaintiff."

The trial court essentially followed the guidelines set out by the Supreme Court as heretofore stated. With the plaintiff's power over the market there can be no doubt that the exclusive dealing arrangements could effectively foreclose competition in a substantial share of the line of commerce affected. The court below determined that "Plaintiff's real purpose was to foreclose competition by its licensees who were its only competitors." We agree that this use of an exclusive dealing arrangement violated Section 3 of the Clayton Act.

[11] On the basis of the finding of plaintiff's misuse of patent No. 4, it was properly denied relief for infringement by the defendant until it could show that it had wholly abandoned its improper practices and that their consequences had been fully dissipated. B.B. Chemical Co. v. Ellis, 314 U.S. 495, 498, 52 USPQ 33, 35.

A. Yes. I recall another thing that in the conference that we were to advise Northland of the—of any settlement, so there would be no—

Q. Now, was this something that you people wanted to do, or was this something that Anderson and Thompson wanted to do?

A. This is something that we people wanted to do, and something that you were aware of and understood by your own admission at the time.

Q. At that conference of June 30th, 1958, were any details of your exclusive sales agreement with Northland discussed?

A. No, they were not, other than the items mentioned at today's deposition, and items given in some interrogatories concerning the suit which was filed, the initial suit which was filed in '57.

Q. At that time was it the desire of you to submit this proposed agreement which I sent to Mr. Schapp in July of '58 to Northland?

A. We didn't submit it to Northland, we only advised them of the proceedings. And the reason that we advised them is that we feel that we are an upstanding, righteous company, and felt that Northland should be at least advised of some of the proceedings that we were going through.

Q. In other words, Northland actually never physically saw the agreement?

A. No. Northland might have seen it.

Q. In other words, a copy of it might have been sent to Northland?

A. Correct.

Q. And approximately when would this have been; shortly after I mailed it down to Mr. Schapp in July of 1958?

A. No, it was after.

Q. How far after?

A. Oh, it might have been after the agreement was signed, and so forth.

Q. Could it have been before the agreement was signed?

A. That the actual agreement was sent to them?

Q. Yes.

A. I don't think so, I don't think that's— No.

Q. In other words, they never saw a copy of the proposed agreement prior to the time it was actually signed?

A. Not of the actual agreement. They were probably— they were advised of it.

Q. Were they advised of specific details of it?

A. They were advised of some of the details.

Q. Did they discuss with you or Mr. Schapp any changes which they would have preferred in this proposed agreement?

A. No.

Q. Were they in favor of an agreement between yourself and Anderson and Thompson?

A. To my knowledge they were neither opposed or in favor of it when we wrote them.

Q. So it is your position that your discussions with Northland were a matter of business courtesy?

A. Correct.